

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TOMMIE SLACK,

Plaintiff,

v.

EARL X. WRIGHT, ELAINE FARR,
JOHN DOE, MELISSA HALLMARK,
ERIC BAUER, AMANDA THOMAS,
JANE 1-2 DOES,

Defendant.

CASE NO. 3:15-CV-05270-RBL-DWC

ORDER TO SHOW CAUSE OR TO
AMEND

Plaintiff Tommie Slack, proceeding *pro se* and *in forma pauperis*, filed this civil rights Complaint pursuant to 42 U.S.C. § 1983. Having reviewed and screened Plaintiff's Complaint under 28 U.S.C. § 1915A, the Court declines to serve Plaintiff's Complaint but provides Plaintiff leave to file an amended pleading by July 11, 2015, to cure the deficiencies identified herein.

BACKGROUND

Plaintiff, who is currently incarcerated at Stafford Creek Corrections Center ("SCCC"), alleges Defendants employed at the Washington Corrections Center ("WCC") prohibited

1 Plaintiff from having contact with his wife, despite a state court judge removing a “no contact
2 order.” Dkt. 6. Plaintiff maintains these Defendants violated his due process rights to have a
3 hearing before being prohibited from seeing his wife. *Id.* Additionally, Defendants employed at
4 SCCC allegedly denied Plaintiff phone communication with his wife and sanctioned him with a
5 loss of visitation without a proper hearing. *Id.* at pp. 18-21. Plaintiff also asserts Defendants
6 Bauer and Hallmark, who are probation officers, and the Department of Corrections (“DOC”) forced Plaintiff “in to vagrancy by refusing housing when [P]laintiff could no longer afford”
7 housing. *Id.* at p. 13. The DOC also allegedly violated Plaintiff’s constitutional rights by not
8 allowing him to serve his probation in Seattle, Washington. *Id.* at p. 14.

10 DISCUSSION

11 Under the Prison Litigation Reform Act of 1995, the Court is required to screen
12 complaints brought by prisoners seeking relief against a governmental entity or officer or
13 employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must “dismiss the
14 complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to
15 state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant
16 who is immune from such relief.” *Id.* at (b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*,
17 152 F.3d 1193 (9th Cir. 1998).

18 In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show: (1) he
19 suffered a violation of rights protected by the Constitution or created by federal statute, and (2)
20 the violation was proximately caused by a person acting under color of state law. *See Crumpton*
21 *v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is therefore to
22 identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271
23 (1994). To satisfy the second prong, a plaintiff must allege facts showing how individually
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1 named defendants caused, or personally participated in causing, the harm alleged in the
2 complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

3 **A. Due Process Violations**

4 Plaintiff contends Defendants Elaine Farr, a unit counselor at WCC, John Doe, a custody
5 unit supervisor at WCC, and Jane Does, counselors at WCC, violated Plaintiff's due process
6 rights by prohibiting him from having contact with his wife, Rev. Ollie Slack, without a proper
7 hearing. Dkt. 6, pp. 9-10. Plaintiff also alleges his due process rights were violated while he was
8 housed at SCCC. Plaintiff maintains Defendant Amanda Thomas, a SCCC counselor, placed an
9 institutional block on Plaintiff's telephone privileges. Dkt. 6, p. 18. Defendant Thomas refused
10 Plaintiff's request to contact the Bellingham Probation Office to "achieve verification of the
11 phone modification" allowing him to speak with Rev. Ollie Slack. *Id.* Plaintiff contends
12 Defendant Thomas's actions constituted a sanction, and Plaintiff was not given a hearing or
13 allowed to appeal the sanction. *Id.* at p. 19. The phone restriction was lifted and Plaintiff's wife
14 was approved for visitation on February 25, 2015. *Id.* at p. 20. Plaintiff alleges he was sanctioned
15 with loss of visitation on April 3, 2015 pursuant to DOC Policy 450.300(IV)(A)(2), and he did
16 not receive proper notice of a hearing or receive a hearing regarding the imposition of the
17 sanction. *Id.* at p. 21. Plaintiff's allegations essentially present Fourteenth Amendment claims.

18 The due process guarantees of the Fourteenth Amendment "apply only when a
19 constitutionally protected liberty or property interest is at stake." *Tellis v. Godinez*, 5 F.3d 1314,
20 1316 (9th Cir. 1993). In *Sandin v. Connor*, 515 U.S. 472 (2003), the Supreme Court makes it
21 clear the "focus of the liberty interest inquiry is whether the challenged condition imposes an
22 atypical and significant hardship on the inmate in relation to the ordinary incidents of prison
23 life." *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003). "A refusal to permit an inmate family
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visits does not impose an atypical and significant hardship; rather, an inmate's inability to visit with whom he wishes is an 'ordinary incident of prison life.'" *Macedon v. California Dep't of Corrections*, 67 Fed. Appx. 407, 408 (9th Cir. 2003) (*quoting Sandin*, 515 U.S. at 485). The loss of telephone privileges also does not "present a dramatic departure from the basic conditions" of prison life. *Mahon v. Prunty*, 87 F.3d. 1320 (9th Cir. 1996) (internal quotations omitted); *see Gallagher v. City of Winlock, Wash.*, 87 Fed. Appx. 568, 576 n. 7 (9th Cir. 2008).

As Plaintiff does not have a liberty interest in visitation and phone privileges, the alleged improper hearings regarding Plaintiff's visitation and phone privileges did not violate his constitutional rights. Accordingly, the Complaint does not state a violation of Plaintiff's due process rights. Plaintiff must show cause why this claim should not be dismissed.

B. Failure to Secure Housing

Plaintiff maintains Defendants Bauer and Hallmark, probation officers, and the DOC forced Plaintiff into "vagrancy" by refusing to provide Plaintiff with housing when he could no longer afford to live in motels. Dkt. 6, pp. 11-13. There is no constitutional right to housing. *See Lindsey v. Normet*, 405 U.S. 56, 74 (1972). Thus, Plaintiff has not alleged a violation of his constitutional rights against Defendants Bauer, Hallmark, and the DOC for "forcing" Plaintiff into "vagrancy." Plaintiff has also not alleged how these Defendants' actions caused Plaintiff to become a vagrant. Plaintiff has therefore failed to state a claim under § 1983.

Further, § 1983 applies to the actions of "persons" acting under the color of state law. The DOC, as an arm of the state of Washington, is not a "person" for purposes of a § 1983 civil rights action. *See Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 65, 71 (1989).

Additionally, there is no evidence the state of Washington has waived its Eleventh Amendment

1 immunity in federal courts. Therefore, the DOC is a state agency which cannot be sued under §
2 1983.

3 Based on the foregoing reasons, Plaintiff must show cause as to why his claim regarding
4 forced “vagrancy” should not be dismissed.

5 **C. Revocation of Probation**

6 Plaintiff alleges the DOC violated his rights by not allowing him to serve his probation in
7 the Seattle, Washington area. Dkt. 6, p. 14. Plaintiff maintains he “suffered seven probation
8 violations for returning to Seattle where he [has] many homes and family/community support.”
9 *Id.* Plaintiff states the DOC refused to transfer his probation and then revoked his probation
10 because he violated the conditions of his probation. As previously stated, the DOC cannot be
11 liable under § 1983. Therefore, Plaintiff has failed to show a person acting under color of state
12 law violated his constitutional rights. Even if Plaintiff is able to name a viable defendant, his
13 Complaint remains deficient because he has not identified a violation of a constitutionally
14 protected right.

15 Plaintiff may only bring a claim under § 1983 alleging the revocation of his probation
16 was unconstitutional if the revocation has been invalidated. *See Heck v. Humphrey*, 512 U.S. 477
17 (1994); *Baskett v. Papini*, 245 Fed. Appx. 677 (9th Cir. 2007) (finding the district court properly
18 dismissed the plaintiff’s § 1983 action because the plaintiff’s allegations called into question the
19 validity of his probation revocation and plaintiff failed to allege the probation had been
20 invalidated). Plaintiff may only recover damages under § 1983 for allegedly unconstitutional
21 imprisonment, or for any other harm caused by actions whose unlawfulness would render the
22 imprisonment invalid, if he can prove the conviction or other basis for confinement has been
23 reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal
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1 authorized to make such a determination, or called into question by a federal court's issuance of
 2 a writ of habeas corpus. *Heck*, 512 U.S. at 486-87.

3 Plaintiff does not allege his revocation or sentence has been reversed on direct appeal,
 4 expunged by executive order, declared invalid by a state tribunal authorized to make such
 5 determination, or called into question by a federal court's issuance of a writ of habeas corpus.
 6 Plaintiff must show cause as to why this claim should not be dismissed.

7 **D. Supervisory Liability**

8 Plaintiff maintains Defendants Bernard Warner and Earl Wright are liable because they
 9 "are either the policy makers or supervise the enforcement of policies created by the Department
 10 of Correction[s]." Dkt. 6, p. 26. Section 1983 supervisory liability cannot be based on *respondeat*
 11 *superior*. See *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). A §
 12 1983 action may not be brought against a supervisor on a theory that the supervisor is liable for
 13 the acts of his or her subordinates. See *Polk County v. Dodson*, 454 U.S. 312, 325 (1981).
 14 Further, to state a claim against any individual Defendant, Plaintiff must allege facts showing the
 15 individual Defendant participated in or directed the alleged violation, or knew of the violation
 16 and failed to act to prevent it. See *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.1998),
 17 cert. denied, 525 U.S. 1154 (1999). Because vicarious liability is inapplicable to a § 1983 suit,
 18 Plaintiff must file an amended complaint pleading facts showing Defendants Warner and Wright,
 19 through their own individual actions, violated Plaintiff's constitutional rights. *Ashcroft v. Iqbal*,
 20 556 U.S. 662 (2009).

21 **E. John/Jane Doe Defendants**

22 Plaintiff identifies John Does and Jane Does as Defendants in this action. The use of
 23 "John Doe" to identify a defendant is not favored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th
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1 Cir.1980). Although a plaintiff may be given an opportunity after filing a lawsuit to discover the
2 identity of unknown defendants through discovery, the use of Doe defendants is problematic
3 because those persons cannot be served with process until they are identified by their real names.
4 If filing an amended complaint, Plaintiff shall attempt to provide the names of Defendants
5 identified as John Doe and Jane Doe.

6 **F. Conclusion**

7 If Plaintiff intends to pursue a § 1983 civil rights action in this Court, he must file an
8 amended complaint and within the amended complaint, he must write a short, plain statement
9 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name of the
10 person who violated the right; (3) exactly what that individual did or failed to do; (4) how the
11 action or inaction of that person is connected to the violation of Plaintiff's constitutional rights;
12 and (5) what specific injury Plaintiff suffered because of that person's conduct. See *Rizzo v.*
13 *Goode*, 423 U.S. 362, 371–72, 377, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

14 Plaintiff shall present the amended complaint on the form provided by the Court. The
15 amended complaint must be legibly rewritten or retyped in its entirety, it should be an original
16 and not a copy, it should contain the same case number, and it may not incorporate any part of
17 the original complaint by reference. The amended complaint will act as a complete substitute for
18 the original Complaint, and not as a supplement. The Court will screen the amended complaint to
19 determine whether it contains factual allegations linking each Defendant to the alleged violations
20 of Plaintiff's rights. The Court will not authorize service of the amended complaint on any
21 Defendant who is not specifically linked to the violation of Plaintiff's rights.

1 If Plaintiff fails to file an amended complaint or fails to adequately address the issues
 2 raised herein on or before July 11, 2015, the undersigned will recommend dismissal of this
 3 action as frivolous pursuant to 28 U.S.C. § 1915.

4 **PENDING MOTIONS**

5 **A. Motion to Serve**

6 Plaintiff filed a Motion to Serve on April 21, 2015, requesting the Court serve
 7 summonses and copies of the Complaint on Defendants. Dkt. 7. The undersigned has determined
 8 Plaintiff's Complaint shall not be served at this time, but has given Plaintiff an opportunity to file
 9 an amended complaint. Because Plaintiff is proceeding *in forma pauperis*, if Plaintiff chooses to
 10 file an amended complaint and the Court determines the amended complaint properly states a
 11 claim, the Court will order the clerk to serve Plaintiff's amended complaint. Accordingly,
 12 Plaintiff's Motion to Serve is denied without prejudice.

13 **B. Motion for Appointment of Counsel**

14 Plaintiff has also filed a Motion for Appointment of Counsel. Dkt. 8. No constitutional
 15 right to appointed counsel exists in a § 1983 action. *Storseth v. Spellman*, 654 F.2d 1349, 1353
 16 (9th Cir. 1981); *see United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir.
 17 1995) (“[a]ppointment of counsel under this section is discretionary, not mandatory”). However,
 18 in “exceptional circumstances,” a district court may appoint counsel for indigent civil litigants
 19 pursuant to 28 U.S.C. § 1915(e)(1) (formerly 28 U.S.C. § 1915(d)). *Rand v. Roland*, 113F.3d
 20 1520, 1525 (9th Cir. 1997), *overruled on other grounds*, 154 F.3d 952 (9th Cir. 1998). To decide
 21 whether exceptional circumstances exist, the Court must evaluate both “the likelihood of success
 22 on the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the
 23 complexity of the legal issues involved.” *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir.
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1 1986) (*quoting Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). A plaintiff must plead
2 facts showing he has an insufficient grasp of his case or the legal issues involved and an
3 inadequate ability to articulate the factual basis of his claims. *Agyeman v. Corrections Corp. of*
4 *America*, 390 F.3d 1101, 1103 (9th Cir. 2004).

5 Plaintiff states he is unable to afford an attorney, his case is complex, and will be difficult
6 to litigate while he is incarcerated. Dkt. 8. The inability to hire counsel is not an exceptional
7 circumstance warranting court appointed counsel. This case does not involve complex facts or
8 law, and Plaintiff has not shown an inability to articulate the factual basis of his claims in a
9 fashion understandable to the Court. Plaintiff has also not shown he is likely to succeed on the
10 merits of his case. Accordingly, Plaintiff's Motion for Appointment of Counsel is denied without
11 prejudice.

12 INSTRUCTIONS TO CLERK

13 The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C. 1983
14 civil rights complaint and for service. The Clerk is further directed to send copies of this Order
15 and Pro Se Instruction Sheet to Plaintiff.

16 Dated this 11th day of June, 2015.

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18 David W. Christel
19 United States Magistrate Judge
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